United States Court of Appeals

for the Second Circuit

APPELLEE'S SUPPLEMENTAL BRIEF

ORIGINAL WITH AFFIDAVIT OF MAILING

74-2675

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2675

UNITED STATES OF AMERICA,
Appellee,

—against—

FREDDIE HILTON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
Assistant United States Attorney,
Of Counsel.

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SUPPLEMENTAL BRIEF FOR THE APPELLEE

PRELIMINARY STATEMENT

On August 8, 1975, this case was remanded by the Court (per Circuit Judges Lumbard, Gibbons and Gurfein), for a further hearing before Chief Judge Mishler, with this Court retaining jurisdiction of the appeal. The opinion further directed that, upon completion of the hearing, the appeal be "referred to the same panel without further briefing on any issue except that to which the hearing on remand is addressed" (slip op. 5471, at 5477).

Following a hearing held on September 9, 1975, and the submission of briefs to the district court, Chief Judge Mishler by Memorandum of Decision and Order dated November 11, 1975 confirmed his previous decision of May 2, 1975 (A. 1) that appellant was not entitled to a new trial.

STATEMENT

A. The Remand

This Court's order remanding this case for further proceedings was designed to allow defense counsel the opportunity to cross-examine Government witnesses "with respect to one significant issue" (slip op. at 5473). That "issue" concerned the failure of the Government to reveal at the trial, which was nearly six months after its receipt, a letter which had been written to the Assistant, Robert L. Clarey, who tried appellant by the Government's accomplice witness, Avon White.[1/]

Upon the prior remand, Judge Mishler had determined, following a hearing conducted without defense counsel, that "[t]he letter in the hands of skilled defense counsel could not have induced a reasonable doubt in the minds of jurors." (A. 13). Accordingly, Judge Mishler did not grant appellant a new trial. Implicit in that opinion, this Court found, was

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1/ That letter, which is reproduced in the first footnote of this Court's opinion (slip op. at 5472) was nearly identical to a letter written by White to another Assistant (Peter Truebner), in the Southern District United States Attorney's Office. The so-called "White-Truebner" letter (A. 505) was not revealed during the trial of Melvin Kearney before District Judge Constance Baker Motley when White testified against Kearney. Kearney was subsequently convicted. Then, during the course of his appeal, the "White-Truebner" letter was discovered in the files of the Southern District U. S. Attorney's Office and, on January 31, 1975, Assistant Clarey was told of the White-Truebner letter. This Court then remanded the Kearney case for further proceedings. See court files in United States v. Kearney, Court of Appeals Docket No. 74-2239 and affidavit of Robert B. Hemley, Assistant U. S. Attorney, in response to defendant's motion for a new trial in 73 CR 1039 (S.D.N.Y.). Kearney subsequently fell to his death in an effort to escape from the Brooklyn House of Detention; his motion, therefore, for a new trial was never determined.

his belief that nondisclosure of the letter was inadvertant.

On appeal, this Court determined that whether a new trial should be granted to appellant turned on whether the suppression was "deliberate or inadvertant" (slip op. at 5474). Only by the threshold resolution of that issue, this Court found, could it be finally concluded that Judge Mishler was correct in applying the reasonable doubt standard. Accordingly, this Court stated (slip op. at 5476-77):

> Our interest in enforcing the prophylactic rule requiring that a new trial be granted in cases of deliberate nondisclosure dictates that the facts surrounding the nondisclosure be developed in an adversarial context. If we were prepared to hold that the district court erred in concluding that the February 8, 1974 letter could not have induced a reasonable doubt, that alone would be a ground for a new trial which would obviate a remand. We are not prepared [to so hold. Thus, we conclude that the case must be re-]manded for a further hearing at which time counsel for Hilton shall be afforded an opportunity to cross-examine those government witnesses familiar with the circumstances surrounding the nondisclosure. Of course, other evidence may be offered which may tend to show that the nondisclosure was other than inadvertent.2/

B. The hearing and the decision of Judge Mishler

We will not treat at length the additional testimony adduced at the September 9th hearing. We treat it briefly because there appears to be no substantial dispute as to the circumstances

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2/ The language in the brackets appeared in the typed slip opinion but not in the printed slip opinion. We assume it was a printer's error and not a deliberate change in the opinion.

which gave rise to the failure to produce the letter at trial. Quite simply, Assistant Clarey who, following receipt of the February letter did nothing more than direct his secretary to file it, forgot about it by the time the trial commenced in July. This, of course, had been his testimony at the April hearing and it remained unchanged after 40 pages of cross-examination by defense counsel. Accordingly, Judge Mishler, in his most recent decision, found that "Mr. Clarey's failure to turn over the letter ... was inadvertant" (p. 2). That conclusion was based upon the following facts as found by the Chief Judge:

> Clarey glanced at the letter when he received it and directed his secretary to file it under the title of the case. He remembered the letter as White's complaint about the conditions of his commitment at Ossining Correctional Institution in solitary confinement. His secretary placed the letter in the general office file as distinguished from the files containing 3500 material. Clarey made a sincere and honest effort to turn over all the 3500 material under his control to defense counsel. He had forgotten receiving the letter and its contents soon after he received it. He did not recall receiving the letter or any portion of the contents until it was called to his attention, post-trial, by Mr. Bergman.3/

3/ United States v. Johnson, 327 U.S. 106, 111 (1945) makes it clear that Judge Mishler's findings must be upheld unless it clearly appears that they "not supported by evidence".

ARGUMENT

NO NEW EVIDENCE WAS PRESENTED TO THE DISTRICT COURT WHICH WARRANTED A CHANGE IN ITS ORIGINAL POSITION THAT THE NONDISCLOSURE OF THE WHITE-CLAREY LETTER WAS INADVERTANT AND NO ARGUMENTS HAVE BEEN SET FORTH BY APPELLANT TO JUSTIFY AN ALTERATION OF CHIEF JUDGE MISHLER'S EXPRESS FINDING OF INADVERTANCE

Appellant's Second Supplemental Brief implicitly concedes that the opportunity to cross-examine Clarey and other witnesses did not change, nor could it change, the central fact that the Government's failure to disclose the White-Clarey letter was not deliberate. Thus, appellant does not openly challenge Chief Judge Mishler's findings of fact nor his ultimate conclusion that the "government proved that the failure to turn over the letter... was inadvertant." Instead, appellant, with not a little verbal legerdemain urges that Clarey's inadvertance at trial was the ultimate result of his "gross negligence" (a phrase recently used in United States v. Morell, _____ F.2d _____; 2d Cir. slip op. 5873, 5882; decided August 29, 1975) in failing to segregate and have ready for trial the letter. With that expression in service, appellant proceeds to parse and characterize Clarey's pretrial conduct in the form of premises which lead, in appellant's view, to the inevitable conclusion that Clarey's conduct was "grossly negligent."

In our view, appellant's argument that the Morell case demands a standard of conduct which, in hindsight, can never be

met by "sincere and honest" prosecutors, should be rejected. Moreover, while in hindsight we cannot fully endorse Assistant Clarey's methods of trial preparation, his systematic efforts to collect and maintain 3500 material and the like (H.B. 29-33) hardly be-speak of "gross negligence" or "reckless disregard." Finally, we believe that the Morell case does not use the phrase "gross negligence" in any sense other than as a substitute expression for the more cumbersome "ignore[s] evidence whose high value to the defense could not have escaped his [the prosecutor's] attention" (Morell, supra, slip op. at 5879), the companion expression for "deliberate suppression."

The underpinning of appellant's attempts to tar Clarey begin with Clarey's receipt in February, 1975, of the letter. He contends that Clarey was "grossly negligent" when, after he received such "arguably relevant 3500 or Brady materials" he "totally disregard[ed]" it and allowed it to become hidden from further review by "himself or the Court" (Br. 5). Of course, one can hardly imagine that the letter was, as appellant suggests, "hidden," when it was placed in the lead prosecution folder of this very case (H.B. 29). Of course, if by use of the word "allow" appellant means to suggest some sinister attempt by Clarey, from the beginning, to lay a foundation for a future disavowal of knowledge of the letter's existence, then Clarey could more easily have destroyed the letter altogether. Yet, appellant seems to argue (more moderately and realisticaly in view of the complete

absence of bad faith) that Clarey was absolutely bound, because of the letter's asserted importance when he received it, to take such steps to insure that, at the trial, the letter would be disclosed. The foundation for such a duty, we suppose, would be a declaration by this Court, that, even though Clarey did not attach any significance to the letter that he should, as a matter of law ("evidence of such high value", etc.) have immediately recognized that the letter was Brady or 3500 material.

The contention that the letter was immediately recognizable as Brady material when it was received has no substance. This Court implicitly rejected that characterization in the context of the trial (slip op. at 5473-74). Certainly, it could not have held greater significance to Clarey five months earlier. Most importantly, though, because Clarey never thereafter sought to cater to White's request for a change in prison environment there was no occasion to use the letter to show White's "sense of gratitude" (Morell, supra, at 5880) to the prosecution. Finally, at the time, it was not known to Clarey that White would eventually be cross-examined on the basis of his previous psychiatric history (H.B. 16). Thus, the brief mention of a "nervos [sic] breakdown" by White could not possibly have triggered a special response by Clarey. In no real sense, then, could the letter have impressed Clarey at the time it was received as either present or latent Brady material.

The alternative contention, that the letter should have been recognized as eventual Jencks Act material, though in hindsight easily stated, must also be viewed as of the time that Clarey received the letter. In February of 1974, this Court's main decisions that the witness-prosecutor letters were "statements" within the meaning of Title 18, United States Code, Section 3500 had yet to be decided. Thus, the letters sent the prosecutor in United States v. Badlamente, 507 F.2d 12, 17-18 (2d Cir.), cert. denied, 421 U.S. 911 (1975), which were found to be 3500 material, were not discussed in opinion form until November 21, 1974, when the case was decided. Similarly, United States v. Sperling, 506 F.2d 1323, 1332 (2d Cir.), cert. denied, 420 U.S. 962 (1975) which discussed the Lipsky-Feffer letter, was not decided until October 10, 1974.

We do not suggest that United States v. Pacelli, 491 F.2d 1108 (2d Cir.) (decided January 11, 1974) which discussed the Lipsky-Morvillo letter in terms of the Jencks Act might not be considered to have given adequate warning. Nevertheless, the Lipsky-Morvillo letter was of a different character than White's innocuous letter to Clarey and contained statements which clearly "related" to his testimony. Thus, it contained a "blatant lie" that Lipsky's prejured testimony at a prior trial had been "unintentional rather than deliberate" [footnote omitted]. Pacelli, supra, 491 F.2d at 1119. Moreover, this

Court characterized that letter as possibly the "capstone" of an attack on Lipsky's credibility. Nevertheless, despite the high value of the Lipsky-Morvillo letter, this Court in Pacelli accepted the characterization of inadvertance placed upon the Assistant's failure to disclose the letter.

It is difficult to put out of mind today's unquestioned view that the White letter should have been immediately viewed as 3500 material and earmarked for future delivery at the trial. Nevertheless, in 1974 (in the early months) it would not have been unreasonable for an Assistant to read White's letter, note that it did not mention any aspect of the substance of his anticipated testimony at trial and conclude that the letter was not 3500 material. Thus, as reaffirmed in Pacelli, supra, 491 F.2d at 1118, the "statement must at least 'relate generally to the events and activities testified to' before the statement must be produced. United States v. Cardillo, 316 F.2d 606, 615 (2d Cir.), cert. denied, 375 U.S. 822 ... (1963)."[4/]

4/ In Jencks v. United States, 353 U.S. 657 (1957), the Court refers to the Government's obligation to disclose "relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial", 353 U.S. at 672, and speaks of the "value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory" 353 U.S. at 667. Senate Report No. 981 recommending the passage of Section 3500 unmistakably announces:

> "...it is the specific intent of the bill to provide for the production only of written statements previously made by a Government witness in the possession of the United States which are signed by him or otherwise adopted or approved by him,.... relating to the matter as to which the witness has testified.
>
> * * * * *
>
> ...a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the Government touching the events and activity as to which a Government witness has testified at the trial...." 1957 U.S. Code Cong. and Adm. News p. 1862 (emphasis added)

In sum, Clarey's "grossly negligent failure," as appellant would have it, to recognize in February, 1974, that the letter was either Brady or 3500 material, is nothing more than a hindsight view, based upon events at the trial. As such, it is hardly a basis for fastening on Clarey an impossible standard of prescience five months earlier.[5/]

Appellant's argument therefore, gains no thrust from his assertions that Clarey "allowed" the letter to become "hidden." Simply put, under the circumstances of the case known then to Clarey his placement of the letter in the file was an appropriate course of conduct. Appellant, however, would have this Court find that even thereafter Clarey was bound to uncover the letter. Thus, appellant asserts that Clarey "was charged with a responsibility which he completely avoided in this case, to keep the letter 'generally available' (as he had done with the 'deal' letter) for further review by himself as the trial and cross-examination of White approached." (Br. 6).

We must answer appellant's argument by adverting once more to the conceded fact that Clarey did absolutely nothing for White in response to the letter. The letter had been read, it was filed and subsequently, there was no occasion for Clarey to have remembered

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5/ We cannot help but add that Clarey's view of the letter, of which Judge Mishler stated: "[he] attached no significance to it" (A. 13), was the same view shared by Truebner who, also, took no special precautions to insure that the letter would, unerringly, be produced at the trial. Thus, he did no more than Clarey: he placed the letter in the file (A. 41) where it was later discovered by Assistant United States Attorney Robert Hemley during the preparation of the Kearney appeal (see footnote 1, supra at 2).

the letter. Clarey, of course, explained the manner in which he gathered the preparation for trial the 3500 material that he would be required to present to defense counsel (H.B. 29, et seq).

Throughout his preparation for trial, Clarey collected what he deemed to be 3500 material and placed this material in a separate folder (H.B. 32-33). Then, immediately prior to trial, Clarey "...went through the file to the places where 3500 material would be, [the separate folder] pulled it out, copied it and provided defense counsel with the prior testimony of White from other jurisdictions (H.B. 37).[6/]

6/ At the hearing, in response to a question of the Court concerning the gathering of Jencks Act material, Clarey stated (H.B. 36):

> THE WITNESS: I most certainly considered the 3500 material that I would turn over carefully and went into a great effort to acquire a great deal of 3500 material from another jurisdiction and turned everything over that I was aware of and found.
>
> THE COURT: Were you satisfied that the files disclosed all the 3500 material and Brady material when you turned it over?
>
> THE WITNESS: Yes certainly I was.

Clarey explained his procedure to gather Jencks Act material in response to defense counsel's question (H.B. 37):

> Q. At any time prior to the end of the trial, from February 8, 1974 until the end of the trial, did you make a search of the file to discover what, if any, Brady material and/or 3500 material existed?
>
> A. I went through the file to the place where 3500 material would be, pulled it out, copied it and provided it, beyond that I went to other jurisdictions and acquired all prior testimony of [Avon] White that I heard about and possibly could have existed.
>
> THE COURT: You turned over everything in the file where you felt the statements were likely to be or were?
>
> THE WITNESS: Correct.

This method of collecting pertinent producible material must be contrasted with that of Assistant United States Attorney Bergman's method, offered at the September 9, 1975 hearing (H.B. 54): "My practice is to go through every piece of paper in the file." Unfortunately, Clarey's manner of collecting 3500 material resulted, inadvertantly, in the nonrevelation of the February 8, 1974 letter. However, the record does not support the appellant's contention that Clarey acted "...in reckless disregard of his duties...." A trial such as this one, involving witnesses who are involved in trials in other jurisdictions, results in massive amounts of 3500 material. While it is now clear that in such cases additional measures must be taken to assure that all producible material is discovered, it cannot be said that Clarey's method of compiling the 3500 material and his efforts to obtain material from other jurisdictions is "gross negligence."

The appellant's contention, then, boils down to the proposition that prosecutors should be presumed to have total recall of all materials which pass through their hands. Urging that it would be all too easy for prosecutor's to state that they have honestly forgotten disclosable materials, appellant suggests that all such lapses of memory are psychological repressions of "detrimental matters" and should be rejected out of hand because, quoting from the dissenting part of Judge Friendly's opinion in Morell, "... this would be an altogether too easy method to evade Giglio." We respond thusly: to the

extent that the field of psychology has a bearing on the law's development in this area, we believe that this Court has consistently made whatever adjustments were necessary in the context of the oft-repreated expression that a new trial is warranted where "the prosecutor has ... ignored evidence whose high value to the defense could not have escaped his attention..." (Morell, supra, slip op. at 5879). That test is fully serviceable and should not be discarded. Finally, Judge Friendly's comments in Morell had nothing whatever to do with appellant's assertion. Judge Friendly was simply concerned with the problem of imputing a prosecutor's knowledge of a defense request for information to the case agent. It had nothing to do with legitimate failures to remember materials in the file and was not a suggestion that "inadvertant or negligent failure on the part of a prosecutor to furnish to the defense evidence in the prosecutor's control" United States v. Stofsky, ____ F.2d ____ (2d Cir. slip op. 515, 524, decided November 7, 1975) was, or ought to be discarded as an appropriate guide to trigger the "significant chance" test.

In sum, nothing has been adduced that indicates Clarey's failure to provide the February 8, 1974 letter was anything other than inadvertance. Thus, under the applicable legal standard, there is no basis for ordering a new trial.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: December 10, 1975

Respectfully submitted,

DAVID G. TRAGER
United States Attorney,
Eastern District of New York

PAUL B. BERGMAN,
Assistant United States Attorney,
Of Counsel.

Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

PAUL B. BERGMAN, being duly sworn, says that on the 11th day of December, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a SUPPLEMENTAL BRIEF FOR APPELLEE (2 copies) of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Robert J. Bloom, Esq.	Lawrence Stern, Esq.
351 Broadway	11 Monroe Place
New York, N.Y. 10013	Brooklyn, N.Y. 11201

Sworn to before me this
11 day of Dec. 1975

JUANITA MAYO
Notary Public, State of New York
No. 24-4501911
Qualified in Kings County
Commission Expires March 30, 1977